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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 20

WMCA, INC., R. PETER STRAUS, ET AL., APPELLANTS

v.

CAROLINE K. SIMON, SECRETARY OF STATE OF THE STATE OF NEW YORK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the three-judge district court dismissing the complaint (R. 294–323) is reported at 208 F. Supp. 368.

A prior opinion dismissing the complaint upon other grounds (R. 88–113) is reported at 202 F. Supp. 741. That order was vacated and the cause remanded for further consideration in *WMCA, Inc.* v. *Simon*, 370 U.S. 190.

JURISDICTION

The judgment of the district court was entered on August 17, 1962 (R. 324–325). The notice of appeal to this Court was filed on August 29, 1962 (R. 325–327), and probable jurisdiction was noted on June 10, 1963 (374 U.S. 802; R. 238). The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the provisions of the New York Constitution which require citizens in any county having more than six percent of the State's population to be given less representation *per capita* in the State Senate than citizens of less populous counties, operate to deny citizens of the populous counties equal protection of the laws.

2. Whether the discrimination against citizens in populous counties in *per capita* representation in both houses of the New York legislature, even if based upon sometimes-permissible criteria, is here so gross in relation to any permissible objective, as to deny the citizens of populous counties the equal protection of the laws.

STATUTES INVOLVED

The relevant provisions of the New York Constitution and laws are summarized in the Statement, pp. 4–7, and set forth in the Appendix, pp. 39–53.

INTEREST OF THE UNITED STATES

This is one of four cases pending argument on the merits in which the Court will be called upon to formulate under the Fourteenth Amendment the con-

stitutional principles applicable to challenges to malapportionment of a State legislature. The United States has filed its principal brief in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, because that case presents a greater variety of issues. There we attempted to present a compendious analysis applicable to all four cases and showing their relation to each other. The instant case raises specific problems in the application of those principles, especially the validity of calculated discrimination in *per capita* representation against the citizens of populous counties solely on the basis of their relative population.

Individually and collectively, these cases present issues of great importance to millions of American citizens seeking full and fair participation in their federal and State governments. This is the primary basis of the government's interest.

STATEMENT

This action was brought on May 1, 1961, in the District Court for the Southern District of New York by the appellants, including individual appellants, who are citizens, residents and registered voters in five of the six most populous New York counties, in their own behalf and on behalf of all New York citizens similarly situated (R. 2–3). Appellees, who were sued in a representative capacity, are officials charged by law with duties in connection with reapportionment and State elections (R. 3–4). The complaint claimed rights under the Civil Rights Act, 42 U.S.C. 1983 and 1988, and asserted jurisdiction under 28 U.S.C.

1343(3). It sought an injunction and also relief under 28 U.S.C. 2201 and 2202 (R. 1–2).

The complaint was directed at those provisions of the New York Constitution which provide for the apportionment of seats in a bicameral legislature. Article III, §§ 1, 2 and 3 provided that the Senate should initially have 50 seats, and it created 50 senatorial districts, as provided therein. Article III, § 4, as amended, provides for readjustment of the size of the Senate and reapportionment of the seats beginning in 1932 and every decade thereafter in the following manner:

> Such districts shall be so readjusted or altered that each senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact form as practicable, and shall remain unaltered until the first year of the next decade as above defined, and shall at all times consist of contiguous territory, and no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county. * * *
>
> No county shall have four or more senators unless it shall have a full ratio for each senator. No county shall have more than one-third of all the senators; and no two counties or the territory thereof as now organized, which are adjoining counties, or which are separated only by public waters, shall have more than one-half of all the senators.
>
> The ratio for apportioning senators shall always be obtained by dividing the number of inhabitants, excluding aliens, by fifty, and the senate shall always be composed of fifty mem-

> bers, except that if any county having three or more senators at the time of any apportionment shall be entitled on such ratio to an additional senator or senators, such additional senator or senators shall be given to such county in addition to the fifty senators, and the whole number of senators shall be increased to that extent.

As interpreted by practice and judicial decision, reapportionment and readjustment of the Senate is accomplished in several stages, two of which are important in the instant case. First, the total population of the State, excluding aliens, as determined by the last federal census, is divided by 50 in order to obtain a ratio. The counties on account of which the size of the Senate might have to be increased are then identified—the counties having three or more ratios, *i.e.*, more than 6 percent of the citizen population. Those counties (which we hereafter call "the populous counties") are then allocated seats for every full ratio. Fractions of a ratio are disregarded. Thereafter each county is divided into the appropriate number of Senate districts.

The second stage is the apportionment of seats to the less populous counties, *i.e.*, to counties none of which has 6 percent of the citizen population. To the 50 original seats there is added the total of seats added by reason of the growth of the populous counties since 1894. In other words, the total number of seats which the populous counties have gained since 1894 is added to the 50 original seats but the seats the other populous counties have lost since 1894 are not deducted from the seats to be added. Currently the New

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York Senate has 58 seats. From that total, the number assigned to the populous counties is subtracted—27 under the 1953 apportionment—and the seats remaining available—31 under the 1953 apportionment—are then apportioned among the less populous counties. The second ratio is obtained by dividing the number of available seats for distribution to the less populous counties (31) into the total citizen population of the less populous counties. Any populous county entitled to two or three seats is then divided into senatorial districts.[1] Counties with substantially less than one second ratio are combined into multi-county districts.[2]

The result is to give the populous counties markedly less *per capita* representation in the State Senate than the less populous counties. Under the 1950 census and 1953 apportionment a senator from one of the less populous counties represented, on the average, 195,859 citizens, whereas a senator from a populous county represented 301,178.[3] A citizen in a less populous county, in other words, had 1.5 times the representation of the average citizen in a populous

[1] A less populous county may be entitled to 3 seats if it has less than 3 full *first* ratios but has more than 3, or has 2 and a large fraction, *second* ratios. A county can have less than 3 first ratios but more than 3 second ratios because the first ratio is larger than the second.

[2] The apportionment of the New York Senate is described in detail in Silva, *Apportionment in New York*, 30 Fordham L. Rev. 581, 603–632. See also Wells, *Legislative Representation in New York State* (International Ladies' Garment Workers Union, 1963), pp. 15–17, 18–19.

[3] The figures are computed from the tables on R. 227–229 and 244.

county. Under the apportionment based upon the 1960 census, the ratio will be 1.7 to 1.[4]

The constitution of 1894 also established an Assembly composed of 150 assemblymen. Art. III, § 2. Each county, except Hamilton County (which "elect[s] with the County of Fulton")—a total of 61—is guaranteed one seat. Art. III, § 5. The remaining 89 seats are apportioned among the appropriate counties in accordance with a ratio obtained by dividing the 150 seats into the total citizen population. A county whose population is at least one and one-half times the ratio receives an additional assemblyman. The remaining seats are then apportioned among those counties whose citizen population is [redacted] or more whole ratios, with any remaining seats being apportioned on the basis of "highest remainders." Finally, the counties are divided into the appropriate assembly districts.[5]

Specifically, the complaint challenged as violations of the due process and equal protection clauses of the Fourteenth Amendment those provisions of the New York Constitution which (1) "require that the

[4] Article III, § 4 requires a new apportionment no later than 1966. The rules laid down in the New York Constitution for apportioning the Senate are so detailed that the legislature has little discretion except in determining which of the less populous counties shall be joined together and in districting within counties having more than one senator. Similarly, the legislature has little discretion as to the Assembly except in districting within counties with more than one assemblyman. Therefore, the outlines of the new apportionment can be predicted with assurance (see R. 234, 237–240).

[5] See Silva, *Apportionment of the New York Assembly*, 31 Fordham L. Rev. 1, 13–30; see also Wells, *Legislative Representation in New York State*, *supra*, pp. 17–19.

total of fifty Senators * * * shall be increased by those Senators to which any of the larger counties become entitled in addition to their allotment as of 1894, but without effect for decreases in other large counties"; (2) "prohibit any county from having four or more Senators unless it has a full ratio for each Senator"; and (3) "require that every county except Hamilton shall always be entitled to one [assemblyman] coupled with the limitation of the entire membership to 150" (R. 6). Because of those provisions and related sections, the complaint alleged, the apportionment formula violated the Fourteenth Amendment, since it resulted "when applied to the population figures of the State in a grossly unfair weighting of both houses in the State legislature in favor of the less populated rural areas of the state to the disadvantage of the densely populated urban centers of the state" (R. 6).

A three-judge court was convened. The New York City defendants admitted the allegations of the complaint and requested the court to grant plaintiffs the relief they were seeking (R. 87–88). The remaining defendants moved to dismiss (R. 90). On January 11, 1962, the district court held that it had jurisdiction but dismissed the complaint on the ground that it failed to state a claim upon which relief could be granted, the issue being nonjusticiable (R. 90, 114). On appeal, this Court vacated the judgment and remanded the cause for reconsideration in the light of *Baker* v. *Carr*, 369 U.S. 186. *WMCA, Inc.* v. *Simon*, 370 U.S. 190. On July 10, 1962, the district court ordered the defendants to answer or otherwise

move in respect to the complaint (R. 114). The chairman of the Board of Supervisors of Nassau County joined the New York City defendants in admitting most of the allegations and requested the court to grant the appellants the relief which they were seeking (R. 116–117). The remaining defendants (now appellees) denied the material allegations and set up various defenses (R. 117–124).

At the hearing on the merits, a large amount of statistical material was admitted into evidence showing the population and citizen population of New York under various censuses both as a whole and by counties and other subdivisions. The apportionment of senators and assemblymen under the 1953 census was established and other computations were put in evidence showing the apportionment to be made under the 1960 census. The basic figures are shown on four charts appearing at R. 227–229, 234, 237, 238–240. Since the appropriateness and significance of the several statistical computations and comparisons are disputed, we reserve further discussion for the Argument.

The district court refused to receive evidence showing what effect the reapportionment rules had on the representation of citizens residing in New York and Nassau counties in respect to such financial matters as the collection of taxes and disbursement of State aid (R. 147–149). The court also excluded evidence proffered to show that the reapportionment rules were "devised for the very purpose" of creating a class of citizens whose representation was inferior to that of a more preferred class and that there was

"intentional discrimination" against citizens of New York City (R. 143–146).

On August 16, 1962, the district court dismissed the complaint on the merits (R. 324–325). The opinion, prepared by District Judge Levet, concluded that appellants had not shown by a fair preponderance of the evidence that there was invidious discrimination; that the apportionment provisions were rational, not arbitrary; that they were of historical origin; that they contained no improper geographical discrimination; that they could be amended by an electoral majority of the people; and that they therefore were not unconstitutional.

ARGUMENT

INTRODUCTION AND SUMMARY

Our basic analysis of the constitutional standards to be applied in adjudicating the present challenges to the constitutionality under the Fourteenth Amendment of the apportionment of seats in State legislatures is set forth in the Brief for the United States in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term.[6] Here, we predicate not only that the Fourteenth Amendment imposes substantive limitations upon State legislative apportionment as urged in that brief (pp. 26–29) but also the correctness of the first proposition there advanced

[6] The analysis, as stated in our Maryland brief, proceeds on the assumption that the Fourteenth Amendment permits reasonable deviations from equal *per capita* representation in at least one house of the legislature. The assumption is made *arguendo*, reserving further judgment, because the issue does not have to be decided in the present cases.

(pp. 29–34)—that any substantial discrimination in *per capita* representation constitutes a denial of equal protection of the laws unless it bears a reasonable relation to some permissible objective of legislative apportionment.

The New York apportionment, unlike those in Maryland, Alabama and Virginia, is not subject to attack as creating gross inequalities among voters without rhyme or reason.[1] There is no crazy-quilt as under the preexisting Alabama apportionment, nor any manifestly capricious discrimination such as that against Fairfax and Arlington Counties and the City of Norfolk in Virginia, and between the City of Baltimore and Baltimore, Montgomery and Prince Georges Counties in the Maryland Senate. In New York, both houses are apportioned systematically, and the apportionment has been kept reasonably current.

The apportionment of seats in the New York Senate, while systematic, is unconstitutional, we submit, under the third proposition advanced in our Maryland brief (pp. 39–45). The systematic discrimination in *per capita* representation is based upon irrelevant, even invidious, criteria. The New York Constitution calls for discrimination, in the apportionment of senators, against the voters of any county that has 6 percent, or more, of the State's population. (For convenience we call such counties "the populous counties" and describe all others as "the less populous coun-

[1] We are here considering only New York's basic *apportionment* methods. We are not considering the various rules for *districting* within counties, which the brief for the appellants argues (pp. 37–39) create crazy-quilts within particular counties.

ties.") We assume *arguendo*, as stated in the *Maryland* case, that under some circumstances a limitation upon the number of representatives that can be captured by geographically small but populous areas may be a reasonable method of assuring that enough seats will be available for the rest of the State to provide representation for each locality. That objective is secured in New York, however, by guaranteeing each county at least one seat in the lower, more numerous house of the legislature, and the discrimination in the Senate adds nothing. Furthermore, the discriminatory mechanism goes far beyond any measure necessary to assure each area some representation. The populous counties are given proportionately less voting power *per capita* as they acquire larger parts of the total population. Thus, the provision for distributing among the less populous counties the seats which are periodically added to the Senate on account of the populous counties stands unmasked as deliberate discrimination against the urban voter, in favor of the rural voter, designed to preserve minority rule. To deprive a man of a vote or to denigrate the value of his vote just because he lives in the city rather than the country is an arbitrary discrimination wholly foreign to democratic ideals. Cf. *Gray* v. *Sanders*, 372 U.S. 368.

We also urge that even if the inequalities in representation *per capita* are based upon criteria relevant to permissible objectives of legislative apportionment, the inequalities are so gross and the resulting departure from the principle of majority rule is so wide, in relation to the objectives, as to constitute

unreasonable discrimination in violation of the equal protection clause. The argument parallels the fourth proposition developed in our *Maryland* brief (pp. 46–50). In New York, neither house is apportioned substantially in accordance with population. Where one house is so apportioned, the Constitution may leave room for considerable accommodation of competing considerations in the other house. Substantially unequal representation *per capita* in both houses requires the strongest justification. Here, the discrimination gives potential control of both houses to minorities of less than forty percent. The built-in disparity in the Senate between the average voting power of the populous counties, on the one hand, and the less populous, on the other, will be 1.7 to 1 after a reapportionment based upon the 1960 census; it is often greater in the Assembly. The desire to assure a diffusion of representation into every locality may justify giving appropriate geographical units each one representative, which has been done in the Assembly, but as here applied, the interest in "diffusion of representation" is a euphemism for guaranteed minority rule—not merely as a check or balance in one house while a popular majority controls the others, but in the entire legislature.

The discrimination against voters in populous counties is not so gross as in Maryland and Alabama, nor is either house subject to control by representatives elected by as small a proportion of the people as in the Alabama and Maryland Senates. The apportionment of the Maryland and Alabama legislatures would be unconstitutional, in our view, even if

that in New York were sustained. We submit, however, despite the differences in degree, that the discrimination in *per capita* representation and denial of majority rule in both houses of the New York legislature offends the Fourteenth Amendment.

THE DISCRIMINATION AGAINST VOTERS IN POPULOUS COUNTIES IN THE PER CAPITA REPRESENTATION ACCORDED THEM IN THE NEW YORK LEGISLATURE CONSTITUTES A DENIAL OF EQUAL PROTECTION OF THE LAWS

A. THE CALCULATED DISCRIMINATION AGAINST VOTERS RESIDING IN ANY COUNTY WITH MORE THAN SIX PERCENT OF THE STATE'S CITIZEN POPULATION VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE THE DIFFERENTIATION IS IRRELEVANT TO ANY PERMISSIBLE OBJECTIVE OF LEGISLATIVE APPORTIONMENT

The New York Constitution provides for the apportionment of seats in the State Senate in a manner that is undeniably calculated to discriminate against the voters of any county having six percent, or more, of the State's citizen population. Its function is slightly concealed by the initial provisions which seem to imply that the apportionment will be by population. Senate districts are to be periodically (Art. III, § 4)—

> so readjusted or altered that each Senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens * * *.

The discrimination against the populous counties is imposed by a subsequent passage (*ibid.*):

> The ratio for apportioning senators shall always be obtained by dividing the number of inhabitants, excluding aliens, by fifty, and the senate shall always be composed of fifty members,

> except that if any county having three or more senators at the time of any apportionment shall be entitled on such ratio to an additional senator or senators, such additional senator or senators shall be given to such county in addition to the fifty senators, and the whole number of senators shall be increased to that extent.

The foregoing provision, as interpreted by uniform practice since 1894 and the decisions of the New York courts, requires the apportionment of the Senate to be accomplished in several stages, two of which are relevant here. First, the total population (excluding aliens) is divided by 50 in order to obtain the ratio. Since the 1960 citizen population was 16,240,786, the ratio will be 324,816 when the new apportionment is made.[8] The counties on account of which the size of the Senate might have to be increased will be those having three or more ratios—in other words, more than six percent of the citizen population. (We call them, for convenience, "the populous counties," and describe all others as "the less populous counties.") The populous counties are ascertained and allocated their seats. Each receives one senator for each whole ratio, but fractions above THREE ratios must be disregarded. N.Y. Const., Art. III, § 4; see *In Re Sherill,* 188 N.Y. 185, 81 N.E. 124, 131–132; *In re Dowling,* 219 N.Y. 44, 113 N.E. 545, 546–548; *In re Fay,* 291 N.Y. 198, 52 N.E. 2d 97, 100–101; Silva, *Apportionment in New York, supra,* pp. 604–608.

[8] The New York Constitution requires that the legislature reapportion and redistrict no later than 1966. Art. III, § 4.

Under the 1960 census, the apportionment of the populous counties will be as follows (R. 288):

County	Population	Senate seats
Bronx	1, 368, 207	4
Erie	1, 039, 648	3
Kings	2, 518, 510	7
Nassau	1, 275, 801	3
New York	1, 584, 069	4
Queens	1, 733, 081	5
	9, 519, 316	26

Because Nassau and Queens gained seven seats since 1894, seven seats will be added, and the Senate will be composed of 57 instead of 50 members.[9]

The second stage involves the apportionment of the remaining seats. Instead of dividing the total of 57 seats evenly among all the counties (prior to grouping or dividing into districts), the seven added seats, plus the 24 remaining after the first allocation, are given exclusively to counties having less than six percent of the citizen population ("the less populous counties"). This is done by dividing the 31 available seats into the citizen population of the less populous counties in order to obtain a second ratio on the

[9] On the other hand, the seven additional seats are not reduced by virtue of the fact that New York and Bronx Counties, which together had 12 seats in 1894, will have only 8 under the new apportionment. Thus, the number of extra seats for distribution to the less populous counties will be greater than the total number of seats the populous counties have gained since 1894.

basis of which seats are assigned to the less populous counties or to districts composed of several counties where necessary to make up a ratio. Although the populous counties receive more than 4 senators only for whole first ratios, the less populous counties may receive seats for large fractions of the considerably smaller second ratios. Ultimately, all the counties with more than one senator are divided into senatorial districts. See *In re Sherill, supra,* 81 N.E. at 132; *In re Fay, supra,* 52 N.E. 2d at 101–102; Silva, *Apportionment in New York, supra,* pp. 628–638.

The resulting discrimination against the voters in any populous county (*i.e.*, one having six percent or more of the citizen population) is apparent. Kings County, which would be entitled to 9 seats in the new apportionment on the basis of population will receive 7; Bronx, entitled to 5, will receive 4; and Erie, entitled to 4, will receive 3.[10] The six first-ratio counties on the basis of citizen population should have a total of 34 Senate seats out of 57—a solid majority; under State law they can have only 26—a definite minority of the Senate.

The average extent to which the objectionable provisions downgrade the vote of anyone who lives in a populous county is readily measured. The populous

[10] The figures in the text were calculated by allocating 57 seats among the counties on the basis of their 1960 citizen population as shown at R. 227–230, according to the rule of whole ratios plus highest remainders.

counties will have 26 senators for 9,519,000 citizens, or one senator for each 366,128. The less populous "second ratio" counties will have 31 senators for 6,721,000 citizens, or one senator for each 216,822. The result, precisely measured, is that every citizen in a less populous "second ratio" county has, on the average, 1.7 times the representation in the State Senate of a citizen in one of the six populous counties."

These consequences are the result of a built-in, discriminatory mechanism explicitly aimed at counties populous enough to have three or more ratios. The

[11] The disparity is as high as 1.7 to 1 for four reasons: (1) The apportionment to the less populous counties is made on the basis of the enlarged Senate—57 senators—and not the assumed 50 seats. (2) All seven additional seats are assigned to the less populous counties in the sense that they receive not 27/57ths—the equivalent of 24/50ths—but 34/57ths. (3) Fractional ratios are disregarded in the case of the populous counties but taken into account in the case of the less populous counties. (4) When one of the populous counties loses a seat, it is not subtracted from the total number but is permanently carried forward and allocated as an extra seat available to the less populous counties.

The actual disparities between voters in individual populous counties and individual less populous counties are often much greater than the average disparity between two classes. The differences result from the manner in which Senate seats are allocated among the less populous counties, the combinations of small counties into single districts, and the variations in the size of the fractional ratios disregarded in dealing with counties having four or more seats. Since our argument is focused primarily upon the discrimination between the populous and less populous counties, the average disparity as between the two classifications is the most reliable figure. The

discrimination is permanent. The larger that particular populous counties become in proportion to the rest of the State; the worse the discrimination gets. The Senate apportionment on the bases of the 1950 census gave the less populous counties 1.5 times the *per capita* representation of the more populous counties.[12] Under the apportionment based upon the 1960 census, the ratio,

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individual disparities are illustrated by the table below, which is extracted from R. 234:

County	1960 citizen population	Number of senators	Citizen population per senator	Ratio to most underrepresented county
Nassau	1,275,801	3	425,267	1.00
New York	1,584,069	4	396,017	1.07
Kings	2,518,510	7	359,787	1.18
Queens	1,733,081	5	346,616	1.22
Erie	1,039,648	3	346,549	1.22
Bronx	1,368,207	4	342,052	1.24
Albany	269,088	1	269,088	1.58
Westchester	782,179	3	260,726	1.63
Oneida	259,330	1	259,330	1.63
Niagara	235,677	1	235,677	1.80
Suffolk	650,112	3	216,704	1.96
Onondaga	414,770	2	207,385	2.05
Monroe	571,029	3	190,343	2.23
All multicounty districts	3,539,285	17	208,193	2.04

The populous counties appear above the heavy line.

[12] The citizen population of the populous counties was 8,131,810. Each of their 27 senators represented, on the average, 301,178 citizens. The citizen population of the less populous counties was 6,071,639. Each of their senators represented, on the average, 195,859 citizens (R. 244).

as we have shown, will be 1.7 to 1.[13] If the voting population of the six populous counties should increase by 4,000,000 people in the decade 1960–1970, while the rest of the State remained constant, the populous counties would receive approximately 31 senators, half the State Senate as then composed, although they would have 67 percent of the voters. A vote in a less populous county would be worth just twice that in a populous county.

The vice in the New York Constitution is that the criterion of differentiation—whether the county in which a voter lives has 6 percent, or more, of the population—is irrelevant to any permissible purpose of the electoral process or legislative apportionment. The equal protection clause, we submit, does not permit discrimination against a voter because of the number of his neighbors or the location of his residence. The prohibition applies not only to eligibility to vote, but to counting the ballot, weighing its value, and apportioning representatives.

It is manifestly arbitrary and capricious to apportion representatives on the basis of race or color. Cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339. Nor can that case be distinguished on the basis of the Fifteenth Amendment; it would be equally arbitrary and

[13] It seems misleading to compare the present representation *per capita* of the six most populous counties according to the 1960 census with the present *per capita* representation of the less populous counties because the New York Constitution requires a new apportionment. See p. 15, note 6 above. The ratio, for what little it is worth, is 1.26 to 1. The ratio was reduced between 1953 and 1960 because the populous counties taken together did not grow as fast as the State as a whole and will lose four senators under the new apportionment.

capricious to apportion representatives on the basis of national origin or religion, or of some such utter irrelevancy as the length of the average voter's left foot.

Occupation, income and residence are likewise irrelevant. In *Gray v. Sanders*, 372 U.S. 368, 379–380, the Court held:

> Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.

If a rural voter is not entitled, by reason of that fact alone, to have a greater voice than an urban voter in the election of a governor, he cannot be entitled, merely by reason of that fact alone, to have greater representation in a State legislature. Both concern the citizen's opportunity to participate in self-government. The voter who has no special virtue in choosing a chief executive by reason of his occupation, economic status or place of residence cannot suddenly claim such value in selecting members of the legislature. It is not a permissible function of legis-

lative apportionment to give special representation to minorities of any race, color, creed, occupation, residence or economic status. Such criteria are all irrelevant.

This is not to say that because every ballot must be given equal weight in an election, every citizen must be given equal representation in a legislature. We recognize the distinction drawn in *Gray* v. *Sanders*. The apportionment of representatives serves different functions than the electoral process. We assume, for present purposes, that the people of a State may, within limits, choose to have their legislators represent not voters but political subdivisions. They may wish to ensure that no locality lacks for some spokesman to explain its needs and views upon an issue. Cf. *MacDougall* v. *Green*, 335 U.S. 281. They may wish to keep the districts small enough to enable the representatives to be closely in touch with all parts of the area. Achieving such objectives may require some sacrifice of the ideal of *per capita* equality of representation. An apportionment which serves such permissible objectives, we concede *arguendo*, is not invalid merely because it also results, if measured by the number of people represented by each seat, in classifications more or less corresponding to economic, occupational or geographical groups. An apportionment is not unconstitutional merely because it gives voters in some areas a larger *per capita* representation than others. This is all, we think, that the distinction drawn in *Gray* v. *Sanders* can reasonably

convey. It cannot mean that in the processes of apportionment, differences in economic or occupational status, geographic residence, or environmental factors like relative density or population have value as such.

We are also willing to assume *arguendo* that a differentiation drawn in terms of invidious criteria, such as the density of population, may possibly be constitutional if it is reasonably adapted to achieving a permissible goal of legislative apportionment. For example, it might be argued that if the size of a legislative body is to be kept small enough for deliberation, placing a limit on the number of representatives that may come from a few populous districts is the only way of saving enough seats for others to allow every part of the State at least one spokesman for its views and interests. That arrangement might also advance the goal of keeping the legislative districts in less populous areas geographically small enough to allow the legislator to be thoroughly familiar with local conditions.

No such justification is available for New York's calculated discrimination against the voters of every county whose population exceeds six percent of the State's total. The discrimination is in the apportionment of the Senate, the smaller, upper chamber of the legislature. There are 150 seats in the Assembly. Not only are the Assembly districts much smaller than the Senate districts, but every county (except Hamilton) is guaranteed at least one representative. It is

in the Assembly, therefore, that representation is diffused so as to assure every locality a spokesman familiar with its problems, needs and interests.

Furthermore, the formula that produces the discrimination goes beyond securing enough Senate seats for the less populous areas to ensure that none goes unrepresented. That could be done by reserving for them a specified number of seats and then, when a populous county with more than three senators became entitled to additional representation, assigning the new seats provided by the Constitution to that county so as not to disturb the absolute number of senators apportioned to the less populous counties. Such a rule would be enough to prevent the relative growth of the populous counties from causing an increase in the area of any Senate district.

The present arrangement is just the reverse. The counties entitled to three or more senators share only in the apportionment of the first 50 seats. The additional seats, added because of the growth of the populous counties, are apportioned only to the less populous. Furthermore, when one of the more populous counties loses seats as compared to its quota in 1894, the loss does not reduce the size of the legislature. New York and Bronx Counties together had 12 seats in 1894,[14] but they will have only four apiece under the new apportionment. The other four populous counties will have seven more seats than they had in 1894. While the populous counties as a group,

[14] The division of Bronx and New York into separate counties occurred after 1894.

therefore, will have only three more seats than in 1894, the Senate will nevertheless have 57 rather than 53 seats, and an extra seven rather than an extra three seats will be distributed to the less populous counties.

These are not reasonable ways of keeping districts small in area or of assuring some representation to each part of the State. Generalized references to the freedom of a State "to assure a proper diffusion of political initiative" (*MacDougall* v. *Green*, 335 U.S. 281, 284) disregard the actual operation, under present circumstances, of New York's method of apportioning the State Senate. Its only function is to reduce the *per capita* representation of the voter in the populous counties as their relative population rises in an effort to maintain minority rule.

Nor can the discrimination in the New York Senate be justified upon the ground that the populous counties are more adequately represented in the Assembly, where each county is guaranteed a representative and the remaining seats are apportioned by population. That arrangement also operates in favor of the less populous counties. Under the next apportionment, the populous counties will receive 48 percent of the assemblymen—72 out of 150—although they have 59 percent of the total citizen population. In the populous counties an assemblyman will represent, on the average, 132,200 citizens; in the less populous counties there will be, on the average, one assemblyman for each 86,170 citizens. Thus, the average disparity will be 1.53 to 1. Many of the individual disparities will

run much higher, as shown by the following table excerpted from R. 238–240: [15]

County	Number of districts	Citizen population per district	Number of representatives	Ratio to most underrepresented district
Suffolk (large)	1	216, 704	1	1. 00
Queens (large)	4	173, 308	4	1. 25
Erie (large)	2	173, 275	2	1. 25
Bronx (large)	4	171, 026	4	1. 26
New York	12	132, 006	12	1. 64
Kings	15	119, 929	15	1. 80
Queens (small)	9	115, 539	9	1. 87
Erie (small)	6	115, 516	6	1. 87
Bronx (small)	6	114, 017	6	1. 90
Orange	2	89, 937	2	2. 41
Dutchess	2	85, 698	2	2. 52
Montgomery	1	56, 287	1	3. 84
Putnam	1	31, 006	1	6. 98
Greene	1	30, 931	1	7. 00
Lewis	1	23, 064	1	9. 39
Schoharie	1	22, 410	1	9. 66
Yates	1	18, 552	1	11. 68
Schuyler	1	14, 974	1	14. 47

[15] The table is partly based upon estimates because the New York Constitution leaves some discretion in districting within counties. See p. 7, note 4.

The major reason for the disparities in size of Assembly districts within the same county is contained in New York Constitution, as amended, Art. III, § 5, which provides: "In counties having more than one senate district, the same number of assembly districts shall be put in each senate district, unless the assembly districts cannot be evenly divided among the senate districts of any county, in which case one more assembly district shall be put in the senate district in such county having the largest, or one less assembly district shall be put in the senate district in such county having the smallest number of inhabitants." An assembly district must be wholly within a senate district. The result is best illustrated by the situation in Monroe County, which will have five assembly and three senate districts under the next apportionment. Two of the senate districts may each be divided evenly into two

The constitutional history invoked by the court below (R. 307–312) condemns, rather than supports, the discriminatory formula for apportioning the New York Senate. We do not challenge New York's constitutional methods of apportionment as they operated in the past. The constitutions of 1777, 1821 and 1846 explicitly provided for the apportionment of the Senate in accordance with voters or population. The discriminatory mechanism was not introduced until 1894. If it operated unfairly then, the fact that the State has deprived a portion of its citizens of equal protection for 70 years would not validate continued discrimination. In truth, the situation has changed radically, and the arguments made today could not have been made with the same force a few decades ago. The less populous counties under the 1903 apportionment, for example, had only 1.2 times the representation of the populous counties.[16] The two-stage apportionment that might once have been regarded as an inept but relatively innocuous method of apportioning new seats required by the relatively faster growth of populous counties has become an instrument for giving each citizen in the less populous counties 1.7 times

assembly districts, but the third assembly district will have to be the size of a senate district; the large assembly district will therefore have approximately 190,000 citizens whereas the four smaller assembly districts will each have approximately 95,000 (R. 239, 240).

Other disparities are caused by the constitutional provision forbidding the division of a town with less than 1½ ratios in forming assembly districts. Art. III, § 5.

[16] Even under the 1953 apportionment the disparity in the representation of less populous and populous counties is only 1.5 to 1, compared with the 1.7 to 1 which will result under the new apportionment.

the voting power of a citizen in a populous county (pp. 15–20 above). The constitutionality of that arrangement must be judged, not by its initial impact, but by the manner in which it currently operates. *Chastleton Corp.* v. *Sinclair,* 264 U.S. 543; *Brown* v. *Board of Education,* 347 U.S. 483, 492–493.

Nor is appellees' case aided by the vote of the citizens of New York in 1957 not to call a constitutional convention. In deciding whether a federal court should exercise its equity jurisdiction to enjoin elections under an allegedly unconstitutional apportionment, it may be material to consider whether the complainants have a political remedy or a State judicial remedy, or are helpless unless heard in the federal court. *Baker* v. *Carr,* 369 U.S. 186, 258–259 (Mr. Justice Clark, concurring). The availability of a political remedy is irrelevant, however, to the substantive question, does the apportionment deny the complainants equal protection of the law. Complainants are entitled to that protection whether they be a majority or a minority; indeed, the protection of minorities is the very purpose of such constitutional guarantees. *Moss* v. *Burkhart,* 207 F. Supp. 885, 894 (W.D. Okla.); *Thigpen* v. *Meyers,* 211 F. Supp. 826, 832 (W.D. Wash.), pending on appeal, No. 381, this Term. The State cannot successfully defend a clear denial of equal protection on the ground that there are ways in which the law can be changed.[17]

[17] Even if the availability of a State political remedy were relevant as to whether a State violated the Fourteenth Amendment, the political remedy in New York is a very inadequate one. The New York Constitution provides for a referendum on whether to call a constitutional conven-

Stripped to its essentials, therefore, the challenge to the apportionment of the New York Senate raises an issue as clear cut as it is fundamental—may a State discriminate in *per capita* representation against the voters in populous areas and in favor of voters in less populous areas when the only function of the discrimination is to increase the political power of the latter beyond their numerical weight.

We submit that the Fourteenth Amendment does not tolerate discrimination based upon such irrelevant criteria. The point was settled, we think, by

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tion every twenty years (a convention may also be called by majority vote of the legislature). Art. XIX, § 2. The question which is placed before the voters is "Shall there be a convention to revise the Constitution and amend the same?" *Ibid.* Thus, the issue of apportionment is not squarely presented and voters do not have the opportunity to decide whether to change the method of apportionment. Since many other issues would be considered by a convention, the voters' determination whether to call the convention will almost certainly, and properly, involve many other factors than apportionment. If the voters decide not to have a convention, it is impossible for the courts to determine whether the voters have decided not to reapportion or have rejected a convention, at least in part, on some other ground. *League of Nebraska Municipalities* v. *Marsh*, 209 F. Supp. 189, 192–193 (D. Neb.); *Davis* v. *Synhorst*, 217 F. Supp. 492, 501 (S.D. Iowa); *Thigpen* v. *Meyers*, *supra*, 211 F. Supp. at 832. In fact, as appellees Screvane, *et al.*, show in their brief (pp. 78–83), the determination of New York's voters in 1957 not to hold a convention was based on a variety of complex questions.

Moreover, even if a constitutional convention had been called, the delegates would have been elected on the basis of three per Senate district, *i.e.*, 174, plus 15 selected at large. Art. XIX, § 2. Thus, the large majority of the delegates would have been chosen on the very discriminatory basis which violates the Fourteenth Amendment.

Gray v. *Sanders,* discussed pp. 21–23 above, but the same decision is required by basic constitutional principles. Representatives are not chosen to represent acres of land, rocks or forests; they represent people, their needs and interests. The notion that any particular "community of interest" should be accorded greater voting-strength than the number of people comprising the community warrants is inconsistent with basic democratic ideals. See Emerson, *Malapportionment and Judicial Power,* 72 Yale L.J. 64, 73 (1962); *One Man—One Vote, A Statement of Basic Principles of Legislative Apportionment* (Twentieth Century Fund, 1962), pp. 8–9. If one minority, such as rural voters, is to be guaranteed greater political power, there is no reason why other minorities, such as labor union members, businessmen, Catholics, Negroes, suburbanites, slum-dwellers, and persons over 65, could not claim similar rights. The argument made on behalf of appellees comes down to the proposition that a State should be free to select a particular minority for preferential treatment in voting without any criteria whatever for making the selection. And if it may favor one, it may repress another. This, we submit, is the very essence of the arbitrariness that both equal protection and due process condemn.

Gross discrimination against populous areas and the arbitrary enhancement of the political power of rural voters not only subverts democratic principles generally; it also has the effect of precluding the States from meeting burgeoning needs resulting from

the transformation of the basic character of our society from predominantly rural to predominantly urban.[18] See Kennedy, *The Shame of the States*, N.Y. Times Magazine, May 18, 1958, pp. 12, 37; U.S. Commission on Intergovernmental Relations, *Report to the President* (1955), p. 3. It is widely agreed that the pressing domestic problems stemming from the metropolitan population explosion—housing, urban renewal and slum clearance, education, transportation, juvenile delinquency, water and air pollution—are not being adequately met. *Id.* at 38; *The Exploding Metropolis*, written by the Editors of *Fortune* (1957), p. 1. The failure is reflected not merely in unresponsiveness to special urban needs and lack of sympathy for the urban point of view, but also in affirmative action rendering it more difficult for urban areas to meet their own problems. This action takes such forms as systematically discriminatory taxation of underrepresented, generally urban, areas as contrasted with overrepresented rural areas; far greater *per capita* spending by the State in overrepresented rural areas than in the urban areas; and the denial even of the urban areas' proportionate share of matching funds provided by the federal government. In addition, the State legislatures have frequently re-

[18] In 1900, at least sixty percent of all Americans lived on farms or in small rural communities, and less than forty percent were city dwellers. Today approximately seventy percent of the people live in urban or suburban areas and the rural population has diminished to about thirty percent. Merry, *Minority Rule: Challenge to Democracy*, Christian Science Monitor, October 2, 1958, reprinted in 106 Cong. Rec. 13836 (daily ed.).

fused to give populous urban centers adequate authority to enable them to solve pressing local problems themselves.

Another result of the discrimination is that urban governments now tend to by-pass the States and enter directly into cooperative arrangements with the national government in such areas as housing, urban development, airports, and water pollution facilities. This multiplication of national-local relationships reinforces the debilitation of State governments by weakening the States' control over their own policies and their authority over their own political subdivisions. The 1955 Report of the U.S. Commission on Intergovernmental Relations (the Kestnbaum Commission, whose members were appointed by the President), cautioned (p. 40) that "the ultimate result * * * may be a new government arrangement that will break down the constitutional pattern which has worked so well up to now." See also United States Advisory Commission on Intergovernmental Relations, *Report: Apportionment of State Legislatures* (1962), pp. 24-27. After hearings on the Kestnbaum study extending over a period of three years, the House Committee on Government Operations emphasized in its final report that "there is a strong national interest in encouraging vigorous and responsible State and local government." H. Rep. No. 2533, 85th Cong., 2d Sess., p. 47.

New York's formula for systematically discriminating against voters in populous counties, without any purpose other than to increase the political power of rural voters, applies only to the apportionment of

the Senate. We doubt whether such unconstitutional classification could be saved by better over-all apportionment of the legislature, for here the evil is the use of irrelevant criteria, not an evil of degree. That question, however, need not be decided. The Assembly is also heavily weighted in favor of the same less populous areas and can be controlled by assemblymen chosen by only 37 percent of the people. The denial of equal protection in the apportionment of senators, therefore, is not corrected but augmented by the apportionment of the Assembly.

B. EVEN IF THE INEQUALITIES IN PER CAPITA REPRESENTATION IN THE SENATE ARE BASED UPON PERMISSIBLE CRITERIA, THE DISCRIMINATION IN BOTH HOUSES IS SO GROSS IN RELATION TO THE OBJECTIVE AS TO DENY EQUAL PROTECTION

In the Brief for the United States in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term, pp. 46–50, 60–90, we developed the argument in support of the general proposition that even though inequalities in *per capita* representation are the result of a rule having some tendency to achieve a permissible objective of legislative apportionment, the inequalities may nevertheless be so gross, in relation to the objective, as to be arbitrary and capricious. We also showed that even though room be assumed for considerable deviation from *per capita* equality of representation in one house of a legislature if the other is apportioned substantially according to population, nevertheless the strongest kind of showing would be required to justify serious inequalities in both houses. In New York neither house is apportioned in accordance with population.

Although the inequalities are less than in Maryland and Alabama, they are still too gross to be supported by the only available justification.

The New York Assembly is apportioned partly on the principle of *per capita* representation and partly to give representation by political subdivisions. Sixty-one of the 150 seats are distributed to each of the counties (except that Hamilton is joined with Fulton County) and the other 89 seats are distributed according to population. Art. III, § 5.[19] The result is not only grave inequality in *per capita* representation but also minority rule of the Assembly.

When the present apportionment was passed in 1953, it allowed, on the basis of the 1950 census, 37.1 percent of the citizens to elect a majority of the Assembly. The disparity between the most underrepresented and most overrepresented districts was about 12 to 1. The five populous counties with over six percent of the citizen population of the State had 57 percent of the citizen population but elected only 47 percent of the Assembly. Similarly, when the new apportionment is made pursuant to the existing rules under the 1960 census, 37 percent of the citizens will elect a majority of the Assembly. The

[19] In addition, every county with 1½ ratios, *i.e.*, one percent of the citizen population, is guaranteed two seats. Art. III, § 5. Since major fractions frequently result in the distribution of extra seats to counties and since there are now only 3 counties with 1½ to 2 ratios, this rule is now of little importance. See Silva, *Apportionment of the New York Assembly*, 31 Fordham L. Rev. 1, 14, 20.

As we have seen above (pp. 26–27, note 15), rules as to districting within counties contribute to the unequal representation.

disparity between the most underrepresented and the most overrepresented counties will be almost 13 to 1. The six populous counties (Nassau now has over six percent of the citizen population) will have almost 59 percent of the citizen population but will elect only 48 percent of the Assembly.[20]

The situation in the Senate is similar (see also pp. 17–20 above). The existing apportionment resulted, under the 1950 census, in 40.9 percent of the citizens electing a majority of the Senate. The discrepancies between the most overrepresented and most underrepresented districts was 2.4 to 1 and the five populous counties, with 57 percent of the citizen population, elected only 45 percent of the Senate. Under the new apportionment, 38 percent of the citizens will elect a majority of the Senate, the disparities between the most overrepresented and most underrepresented district will be at least 2.5 to 1, and the six populous counties with 59 percent of the citizen population will elect 45.6 percent of the Senate.

These figures, we believe, establish that the New York apportionment provisions, as specified in the Constitution and judicial decisions and uniformly applied by the legislature, result in gross inequalities

[20] As we noted above (p. 20, note 13), testing the existing apportionment under the 1960 census seems largely irrelevant. The apportionment was made by applying the required rules to the 1950 census. The New York Constitution requires that a similar reapportionment be conducted on the basis of the 1960 census. Nothing is shown as to New York's apportionment rules by matching the existing apportionment against census figures which had nothing to do with it, particularly when the apportionment must soon be redone.

in the representation of voters and give control of the legislature to a relatively small minority of the people. Considering the New York legislature as a whole (see our brief in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term, pp. 72–73), neither house is apportioned on the basis of population; members elected by 37 to 41 percent of the citizen population constitute a majority of each house. Whether or not such inequality may be justified in one house, we submit that it cannot be justified in both. For the effect is to replace representation based on population with an entirely different standard, thus submerging the principles of voter equality and majority rule.

Moreover, New York offers no satisfactory explanation for the gross discrimination against citizens living in populous counties. We have seen (pp. 23–24) that any theory of giving adequate representation to political subdivisions or less populous areas is taken care of by the apportionment of the Assembly which guarantees a representative for each county. In our view, the method of apportioning the Senate adds nothing to those objectives or to any meaningful diffusion of representation (see pp. 24–25 above). But even if it be thought to add something, it does not add enough to justify the serious disparities that the apportionment in the Senate adds to the disparities in the House, with the consequence of depriving a majority of the people of control of either chamber.

We have also seen (pp. 27–28) that history is no

justification for the apportionment of the Senate because until 1894 it was apportioned on the basis of voters or population (excluding aliens, colored persons not taxed and, under the 1821 Constitution, paupers) and even then the present constitutional formula did not operate in so discriminatory a way as it does now. While the 1821 Constitution (Art. I, § 7) first guaranteed one representative per county (prior to this, apportionment was entirely on the basis of eligible voters), the result was not so discriminatory throughout the nineteenth century. The 1836 apportionment resulted, for example, in 42 percent of the population electing a majority of the Assembly, the 1857 apportionment in 44 percent, and the 1906 apportionment in 41 percent.[21] On the first and second occasion the Senate was apportioned according to population, and on the third the deviation in the Senate was comparatively small.

Nor, as we have seen (pp. 28–29), can the reapportionment be justified on the ground that a political remedy is available.

In short, both houses of the New York legislature substantially discriminate against citizens living in populous areas. New York offers no reasons justifying such substantial discrimination. The apportionment therefore violates the Fourteenth Amendment.

[21] While we have used total population without excluding aliens, colored persons not taxed, or paupers in computing these figures, the distinction is of relatively little significance. Indeed, the difference overrepresents the discrepancies from equality, since most non-citizens live in populous, underrepresented areas.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision of the district court should be reversed.

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APPENDIX

Sections 1 to 5 of Article III of the 1894 New York Constitution, as amended, 2 McKinney's Consolidated Laws of New York Annotated, Part 1, provide as follows:

> *Section 1.* The legislative power of this State shall be vested in the Senate and Assembly.
> *Section 2.* The senate shall consist of fifty members, except as hereinafter provided. The senators elected in the year one thousand eight hundred and ninety-five shall hold their offices for three years, and their successors shall be chosen for two years. The assembly shall consist of one hundred nad fifty members. The assemblymen elected in the year one thousand nine hundred and thirty-eight, and their successors, shall be chosen for two years.
> *Section 3.* The state shall be divided into fifty districts to be called senate districts, each of which shall choose one senator. The districts shall be numbered from one to fifty, inclusive.
>
> District number one (1) shall consist of the counties of Suffolk and Richmond.
>
> District number two (2) shall consist of the county of Queens.
>
> District number three (3) shall consist of that part of the county of Kings comprising the first, second, third, fourth, fifth and sixth wards of the city of Brooklyn.
>
> District number four (4) shall consist of that part of the county of Kings comprising the seventh, thirteenth, nineteenth and twenty-first wards of the city of Brooklyn.
>
> District number five (5) shall consist of that part of the county of Kings comprising the eighth, tenth, twelfth and thirtieth wards of

the city of Brooklyn, and the ward of the city of Brooklyn which was formerly the town of Gravesend.

District number six (6) shall consist of that part of the county of Kings comprising the ninth, eleventh, twentieth and twenty-second wards of the city of Brooklyn.

District number seven (7) shall consist of that part of the county of Kings comprising the fourteenth, fifteenth, sixteenth and seventeenth wards of the city of Brooklyn.

District number eight (8) shall consist of that part of the county of Kings comprising the twenty-third, twenty-fourth, twenty-fifth and twenty-ninth wards of the city of Brooklyn, and the town of Flatlands.

District number nine (9) shall consist of that part of the county of Kings comprising the eighteenth, twenty-sixth, twenty-seventh and twenty-eighth wards of the city of Brooklyn.

District number ten (10) shall consist of that part of the county of New York within and bounded by a line beginning at Canal street and the Hudson river, and running thence along Canal street, Hudson street, Dominick street, Varick street, Broome street, Sullivan street, Spring street, Broadway, Canal street, the Bowery, Division street, Grand street and Jackson street, to the East river and thence around the southern end of Manhattan Island, to the place of beginning, and also Governor's, Bedloe's and Ellis islands.

District number eleven (11) shall consist of that part of the county of New York lying north of district number ten, and within and bounded by a line beginning at the junction of Broadway and Canal street, and running thence along Broadway, Fourth street, the Bowery and Third avenue, St. Mark's place, Avenue A, Seventh street, Avenue B, Clinton street, Rivington street, Norfolk street, Divi-

sion street, Bowery and Canal street, to the place of beginning.

District number twelve (12) shall consist of that part of the county of New York lying north of districts numbers ten and eleven and within and bounded by a line beginning at Jackson street and the East river, and running thence through Jackson street, Grand street, Division street, Norfolk street, Rivington street, Clinton street, Avenue B, Seventh street, Avenue A, St. Mark's place, Third avenue, East Fourteenth street to the East river, and along the East river to the place of beginning.

District number thirteen (13) shall consist of that part of the county of New York lying north of district number ten, and within and bounded by a line beginning at the Hudson river at the foot of Canal street, and running thence along Canal street, Hudson street, Dominick street, Varick street, Broome street, Sullivan street, Spring street, Broadway, Fourth street, the Bowery and Third avenue, Fourteenth street, Sixth avenue, West Fifteenth street, Seventh avenue, West Nineteenth street, Eighth avenue, West Twentieth street, and the Hudson river, to the place of beginning.

District number fourteen (14) shall consist of that part of the county of New York lying north of districts numbers twelve and thirteen, and within and bounded by a line beginning at East Fourteenth street and the East river, and running thence along East Fourteenth street, Irving place, East Nineteenth street, Third avenue, East Twenty-third street, Lexington avenue, East Fifty-third street, Third avenue, East Fifty-second street, and the East river, to the place of beginning.

District number fifteen (15) shall consist of that part of the county of New York lying

north of district number thirteen, and within and bounded by a line beginning at the junction of West Fourteenth street and Sixth avenue, and running thence along Sixth avenue, West Fifteenth street, Seventh avenue, West Fortieth street, Eighth avenue, and the transverse road across Central park at Ninety-seventh street, Fifth avenue, East Ninety-sixth street, Lexington avenue, East Twenty-third street, Third avenue, East Nineteenth street, Irving place and Fourteenth street, to the place of beginning.

District number sixteen (16) shall consist of that part of the county of New York lying north of district number thirteen, and within and bounded by a line beginning at Seventh avenue and West Nineteenth street, and running thence along West Nineteenth street, Eighth avenue, West Twentieth street, the Hudson river, West Forty-sixth street, Tenth avenue, West Forty-third street, Eighth avenue, West Fortieth street and Seventh avenue, to the place of beginning.

District number seventeen (17) shall consist of that part of the county of New York lying north of district number sixteen, and within and bounded by a line beginning at the junction of Eighth avenue and West Forty-third street, and running thence along West Forty-third street, Tenth avenue, West Forty-sixth street, the Hudson river, West Eighty-ninth street, Tenth or Amsterdam avenue, West Eighty-sixth street, Ninth or Columbus avenue, West Eighty-first street and Eighth avenue, to the place of beginning.

District number eighteen (18) shall consist of that part of the county of New York lying north of district number fourteen, and within and bounded by a line beginning at the junction of East Fifty-second street and the East river, and running thence along East Fifty-

second street, Third avenue, East Fifty-third street, Lexington avenue, East Eighty-fourth street, Second avenue, East Eighty-third street and the East river, to the place of beginning; and also Blackwell's island.

District number nineteen (19) shall consist of that part of the county of New York lying north of district number seventeen, and within and bounded by a line beginning at West Eighty-ninth street and the Hudson river, and running thence along the Hudson river and Spuyten Duyvil creek around the northern end of Manhattan island; thence southerly along the Harlem river to the north end of Fifth avenue; thence along Fifth avenue, East One Hundred and Twenty-ninth street, Fourth or Park avenue, East One Hundred and Tenth street, Fifth avenue, the transverse road across Central park at Ninety-seventh street, Eighth avenue, West Eighty-first street, Ninth or Columbus avenue, West Eighty-sixth street, Tenth or Amsterdam avenue and West Eighty-ninth street, to the place of beginning.

District number twenty (20) shall consist of that part of the county of New York lying north of districts numbers eighteen and fifteen, and within and bounded by a line beginning at East Eighty-third street and the East river, running thence through East Eighty-third street, Second avenue, East Eighty-fourth street, Lexington avenue, East Ninety-sixth street, Fifth avenue, East One Hundred and Tenth street, Fourth or Park avenue, East One Hundred and Nineteenth street to the Harlem river, and along the Harlem and East rivers to the place of beginning; and also Randall's island and Ward's island.

All of the above districts in the county of New York bounded upon or along the boundary waters of the county, shall be deemed to extend to the county line.

District number twenty-one (21) shall consist of that part of the county of New York lying north of districts numbers nineteen and twenty, within and bounded by a line beginning at East One Hundred and Nineteenth street and the Harlem river, and running thence along East One Hundred and Nineteeth street, Fourth or Park avenue, One Hundred and Twenty-ninth street, Fifth avenue and the Harlem river, to the place of beginning; and all that part of the county of New York not hereinbefore described.

District number twenty-two (22) shall consist of the county of Westchester.

District number twenty-three (23) shall consist of the counties of Orange and Rockland.

District number twenty-four (24) shall consist of the counties of Dutchess, Columbia and Putnam.

District number twenty-five (25) shall consist of the counties of Ulster and Greene.

District number twenty-six (26) shall consist of the counties of Delaware, Chenango and Sullivan.

District number twenty-seven (27) shall consist of the counties of Montgomery, Fulton, Hamilton and Schoharie.

District number twenty-eight (28) shall consist of the counties of Saratoga, Schenectady and Washington.

District number twenty-nine (29) shall consist of the county of Albany.

District number thirty (30) shall consist of the county of Rensselaer.

District number thirty-one (31) shall consist of the counties of Clinton, Essex and Warren.

District number thirty-two (32) shall consist of the counties of St. Lawrence and Franklin.

District number thirty-three (33) shall consist of the counties of Otsego and Herkimer.

District number thirty-four (34) shall consist of the county of Oneida.

District number thirty-five (35) shall consist of the counties of Jefferson and Lewis.

District number thirty-six (36) shall consist of the county of Onondaga.

District number thirty-seven (37) shall consist of the counties of Oswego and Madison.

District number thirty-eight (38) shall consist of the counties of Broome, Cortland and Tioga.

District number thirty-nine (39) shall consist of the counties of Cayuga and Seneca.

District number forty (40) shall consist of the counties of Steuben and Yates.

District number forty-one (41) shall consist of the counties of Chemung, Tompkins and Schuyler.

District number forty-two (42) shall consist of the counties of Ontario and Wayne.

District number forty-three (43) shall consist of that part of the county of Monroe comprising the towns of Brighton, Henrietta, Irondequoit, Mendon, Penfield, Perinton, Pittsford, Rush and Webster, and the fourth, sixth, seventh, eighth, twelfth, thirteenth, fourteenth, sixteenth, seventeenth and eighteenth wards of the city of Rochester, as at present constituted.

District number forty-four (44) shall consist of that part of the county of Monroe comprising the towns of Chili, Clarkson, Gates, Greece, Hamlin, Ogden, Parma, Riga, Sweden and Wheatland; and the first, second, third, fifth, ninth, tenth, eleventh, fifteenth, nineteenth and twentieth wards of the city of Rochester, as at present constituted.

District number forty-five (45) shall consist of the counties of Niagara, Genesee and Orleans.

District number forty-six (46) shall consist of the counties of Allegany, Livingston and Wyoming.

District number forty-seven (47) shall consist of that part of the county of Erie compris-

ing the first, second, third, sixth, fifteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third and twenty-fourth wards of the city of Buffalo, as at present constituted.

District number forty-eight (48) shall consist of that part of the county of Erie comprising the fourth, fifth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and sixteenth wards of the city of Buffalo, as at present constituted.

District number forty-nine (49) shall consist of that part of the county of Erie comprising the seventeenth, eighteenth and twenty-fifth wards of the city of Buffalo, as at present constituted; and all the remainder of the said county of Erie not hereinbefore described.

District number fifty (50) shall consist of the counties of Chautauqua and Cattaraugus.

Section 4. Except as herein otherwise provided, the federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of senate and assembly districts next occurring, in so far as such census and the tabulation thereof purport to give the information necessary therefor. The legislature, by law, shall provide for the making and tabulation by state authorities of an enumeration of the inhabitants of the entire state to be used for such purposes, instead of a federal census, if the taking of a federal census in any tenth year from the year nineteen hundred thirty be omitted or if the federal census fails to show the number of aliens or Indians not taxed. If a federal census, though giving the requisite information as to the state at large, fails to give the information as to any civil or territorial divisions which is required to be known for such purposes, the legislature,

by law, shall provide for such an enumeration of the inhabitants of such parts of the state only as may be necessary, which shall supersede in part the federal census and be used in connection therewith for such purposes. The legislature, by law, may provide in its discretion for an enumeration by state authorities of the inhabitants of the state, to be used for such purposes, in place of a federal census, when the return of a decennial federal census is delayed so that it is not available at the beginning of the regular session of the legislature in the second year after the year nineteen hundred thirty or after any tenth year therefrom, or if an apportionment of members of assembly and readjustment or alteration of senate districts is not made at or before such a session. At the regular session in the year nineteen hundred thirty-two, and at the first regular session after the year nineteen hundred forty and after each tenth year therefrom the senate districts shall be readjusted or altered, but if, in any decade, counting from and including that which begins with the year nineteen hundred thirty-one, such a readjustment or alteration is not made at the time above prescribed, it shall be made at a subsequent session occurring not later than the sixth year of such decade, meaning not later than nineteen hundred thirty-six, nineteen hundred forty-six, nineteen hundred fifty-six, and so on; provided, however, that if such districts shall have been readjusted or altered by law in either of the years nineteen hundred thirty or nineteen hundred thirty-one, they shall remain unaltered until the first regular session after the year nineteen hundred forty. Such districts shall be so readjusted or altered that each senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact form as practicable, and shall remain unaltered until the first year of the next decade as above

defined, and shall at all times consist of contiguous territory, and no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county. No town, except a town having more than a full ratio of apportionment, and no block in a city inclosed by streets or public ways, shall be divided in the formation of senate districts; nor shall any district contain a greater excess in population over an adjoining district in the same county, than the population of a town or block therein adjoining such district. Counties, towns or blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens.

No county shall have four or more senators unless it shall have a full ratio for each senator. No county shall have more than one-third of all the senators; and no two counties or the territory thereof as now organized, which are adjoining counties, or which are separated only by public waters, shall have more than one-half of all the senators.

The ratio for apportioning senators shall always be obtained by dividing the number of inhabitants, excluding aliens, by fifty, and the senate shall always be composed of fifty members, except that if any county having three or more senators at the time of any apportionment shall be entitled on such ratio to an additional senator or senators, such additional senator or senators, shall be given to such county in addition to the fifty senators, and the whole number of senators shall be increased to that extent.

The senate districts, including the present ones, as existing immediately before the enactment of a law readjusting or altering the senate districts, shall continue to be the senate districts of the state until the expirations of the

terms of the senators then in office, except for the purpose of an election of senators for full terms beginning at such expirations, and for the formation of assembly districts.

Section 5. The members of the assembly shall be chose by single districts and shall be apportioned by the legislature at each regular session at which the senate districts are readjusted or altered, and by the same law, among the several counties of the state, as nearly as may be according to the number of their respective inhabitants, excluding aliens. Every county heretofore established and separately organized, except the county of Hamilton, shall always be entitled to one member of assembly, and no county shall hereafter be erected unless its population shall entitle it to a member. The county of Hamilton shall elect with the county of Fulton, until the population of the county of Hamilton shall, according to the ratio, entitle it to a member. But the legislature may abolish the said county of Hamilton and annex the territory thereof to some other county or counties.

The quotient obtained by dividing the whole number of inhabitants of the state, excluding aliens, by the number of members of assembly, shall be the ratio for apportionment, which shall be made as follows: One member of assembly shall be apportioned to every county, including Fulton and Hamilton as one county, containing less than the ratio and one-half over. Two members shall be apportioned to every other county. The remaining members of assembly shall be apportioned to the counties having more than two ratios according to the number of inhabitants, excluding aliens. Members apportioned on remainders shall be apportioned to the counties having the highest remainders in the order thereof respectively. No county shall have more members of assem-

bly than a county having a greater number of inhabitants, excluding aliens.

The assembly districts, including the present ones, as existing immediately before the enactment of a law making an apportionment of members of assembly among the counties, shall continue to be the assembly districts of the state until the expiration of the terms of members then in office, except for the purpose of an election of members of assembly for full terms beginning at such expirations.

In any county entitled to more than one member, the board of supervisors, and in any city embracing an entire county and having no board of supervisors, the common council, or if there be none, the body exercising the powers of a common council, shall assemble at such times as the legislature making an apportionment shall prescribe, and divide such counties into assembly districts as nearly equal in number of inhabitants, excluding aliens, as may be, of convenient and contiguous territory in as compact form as practicable, each of which shall be wholly within a senate district formed under the same apportionment, equal to the number of members of assembly to which such county shall be entitled, and shall cause to be filed in the office of the secretary of state and of the clerk of such county, a description of such districts, specifying the number of each district and of the inhabitants thereof, excluding aliens, according to the census or enumeration used as the population basis for the formation of such districts; and such apportionment and districts shall remain unaltered until after the next reapportionment of members of assembly, except that the board of supervisors of any county containing a town having more than a ratio of apportionment and one-half over may alter the assembly districts in a senate district containing such town at any time on or before March first, nineteen

hundred forty-six. In counties having more than one senate district, the same number of assembly districts shall be put in each senate district, unless the assembly districts cannot be evenly divided among the senate districts of any county, in which case one more assembly district shall be put in the senate district in such county having the largest, or one less assembly district shall be put in the senate district in such county having the smallest number of inhabitants, excluding aliens, as the case may require. No town, except a town having more than a ratio of apportionment and one-half over, and no block in a city inclosed by streets or public ways, shall be divided in the formation of assembly districts, nor shall any districts contain a greater excess in population over an adjoining district in the same senate district, than the population of a town or block therein adjoining such assembly district. Towns or blocks which, from their location may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens. Nothing in this section shall prevent the divison, at any time, of counties and towns and the erection of new towns by the legislature.

An apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe; and any court before which a cause may be pending involving an apportionment, shall give precedence thereto over all other causes and proceedings, and if said court be not in session it shall convene promptly for the disposition of the same.

Section 121 of 56 McKinney's Consolidated Laws of New York Annotated (1963 Supp.), defines the boundaries of the 58 Senate districts.

This provision is set out at pages 82-119 of Appellants' brief.

Section 122 and 123 of 56 McKinney's Consolidated Laws of New York Annotated (1963 Supp.), provide as follows:

> *Section 122.* The assembly districts of this state, as existing immediately before the enactment of this article, shall continue to be the assembly districts of the state until the expiration of the terms of the members then in office, except for the purpose of an election of members of assembly for full terms beginning at such expirations and except for the election of delegates to a state or judicial district convention, members of a state committee, members of a county committee or any other party office or position, and any public office to be filled for a term or terms commencing on or after or to continue beyond January first, nineteen hundred fifty-five.
>
> *Section 123.* Except as provided in section one hundred twenty-two, the number of members of assembly of this state hereafter to be chosen in the several counties thereof shall be as follows:
>
> In the county of Albany, two.
> In the county of Allegany, one.
> In the county of Bronx, twelve.
> In the county of Broome, two.
> In the county of Cattaraugus, one.
> In the county of Cayuga, one.
> In the county of Chautauqua, one.
> In the county of Chemung, one.
> In the county of Chenango, one.
> In the county of Clinton, one.
> In the county of Columbia, one.
> In the county of Cortland, one.
> In the county of Delaware, one.
> In the county of Dutchess, one.
> In the county of Erie, eight.
> In the county of Essex, one.
> In the county of Franklin, one.
> In the counties of Fulton and Hamilton, one.
> In the county of Genesee, one.

In the county of Greene, one.
In the county of Herkimer, one.
In the county of Jefferson, one.
In the county of Kings, twenty-two.
In the county of Lewis, one.
In the county of Livingston, one.
In the county of Madison, one.
In the county of Monroe, four.
In the county of Montgomery, one.
In the county of Nassau, six.
In the county of New York, sixteen.
In the county of Niagara, two.
In the county of Oneida, two.
In the county of Onondaga, three.
In the county of Ontario, one.
In the county of Orange, two.
In the county of Orleans, one.
In the county of Oswego, one.
In the county of Otsego, one.
In the county of Putnam, one.
In the county of Queens, thirteen.
In the county of Rensselaer, one.
In the county of Richmond, two.
In the county of Rockland, one.
In the county of St. Lawrence, one.
In the county of Saratoga, one.
In the county of Schenectady, one.
In the county of Schoharie, one.
In the county of Schuyler, one.
In the county of Seneca, one.
In the county of Steuben, one.
In the county of Suffolk, three.
In the county of Sullivan, one.
In the county of Tioga, one.
In the county of Tompkins, one.
In the county of Ulster, one.
In the county of Warren, one.
In the county of Washington, one.
In the county of Wayne, one.
In the county of Westchester, six.
In the county of Wyoming, one.
In the county of Yates, one.

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